

**REMARKS**

Claims 24, 25, 27-32, 35 and 37-54 and 56-74 remain pending after amendment, with claims 57-68 being withdrawn from consideration.

**Claim Amendments**

By this amendment, the following claim amendments are made:

- (1) claim 24 is amended to more clearly define the claimed invention. Support for the noted amendments to claim 24 resides at least at the following portions of applicant's specification: page 4, lines 14-20; page 6, lines 17-21; page 6, lines 27-34; page 7, lines 13-29; page 10, lines 23-27; and page 12, lines 11-20.
- (2) Claim 27 is rewritten in independent form and also amended to clarify that the animal or vegetable fats are "mechanically admixed" with the tomato composition, support for which resides at page 5, third full paragraph of the substitute specification, as well as Examples 3 and 5-9 of the specification .
- (3) Claim 37 is rewritten in independent form;
- (4) Claim 39 is rewritten in independent form;
- (5) Claim 40 is amended to include limitations of claim 27;
- (6) Claim 45 is amended to recite a temperature range which previously resided in claim 48, as well as the limitations of claim 24;
- (7) Claim 48 is amended to recite a preferred temperature range, support for which resides at page 9 of the substitute specification;
- (8) Claim 55 is canceled, as being redundant with amended claim 45. No new matter is added by the above claim amendments. Entry and consideration of this amendment are also believed appropriate

**Withdrawal of Rejections under 35 USC 112**

Applicant acknowledges with appreciation the withdrawal of the previous rejections under 35 USC 112 (paragraphs one and two).

**Withdrawal of Specification Objection**

Applicant acknowledges with appreciation the withdrawal of the previous objection to the specification.

**Interview with Examiner**

Applicant acknowledges with thanks the courtesy extended toward applicant's representative during the interview of April 18, 2008. During the interview, the distinctions that exist between the claimed invention and the cited prior art were discussed. The above amendments to the claims were also proposed. No agreement was reached regarding the allowance of the pending claims, with the Examiner reserving judgment pending consideration of the amended claims.

**Applicant's Invention**

By way of review, in one embodiment applicant's invention is directed a tomato composition obtained from tomato juice or tomato passatas having the following composition in percentage by weight:

-dry residue 5.5 - 20%,

-water 94.5-80%,

100% being the sum of the two components,

wherein said dry residue comprises water-insoluble *tomato* solids and water-soluble *tomato* solids, wherein the amount of water-insoluble tomato solids and water-soluble tomato solids in the dry residue ranges in percentage by weight as follows, based on the total weight of the dry residue:

-water-insoluble *tomato* solids from 18% to 30%,

-water-soluble *tomato* solids from 82% to 70%.

In another embodiment, applicant's invention is directed to a tomato product prepared by a process comprising separating by filtration tomato serum from water insoluble solids present in either tomato juice or in tomato passatas using a separation solid-liquid apparatus at a temperature of from 5 to 25°C wherein said tomato juice or tomato passatas is maintained under stirring with a stirrer at an angular speed from 1 rpm to 20 rpm during filtration, the stirrer being of a shape to convey the tomato juice or tomato passatas toward the central axis of the apparatus, and recovering said tomato serum and/or said water insoluble solids as said tomato product.

In yet another embodiment, applicant's invention is directed to a method of saucing food utilizing the tomato composition of the present invention.

In still yet another embodiment, applicant's invention comprises a ready-to-use tomato sauce for food.

In yet further embodiments, applicant's invention is directed to foods comprising the novel tomato composition of the present invention.

As discussed at pages 1-4 of applicant's specification, and as discussed during the interview, it is known to use triple tomato concentrate, double tomato concentrate, tomato concentrate, and

tomata passatas as food products. However, such products require either concentration or dilution prior to use. The resulting products suffer the disadvantage of either exhibiting poor taste properties or poor saucing power (demonstrated by poor adhesion to food such as pasta).

Applicant has surprising and unexpectedly found that the claimed product exhibits both improved saucing power *and* excellent taste properties (i.e., devoid of any caramel taste, bitter taste, cooking aroma or sour taste), a result not heretofore demonstrated by prior art tomato products. Such enhanced properties are demonstrated at Table 7 of applicant's specification.

Applicant's claimed invention in its various embodiments is neither disclosed nor suggested by the cited prior art.

**Rejections under 35 USC 103(a)**

The Examiner makes Final the following prior art rejections against the pending claims:

(1) Claims 24, 25, 27-30, 35, 37-44, 69 and 70 stand rejected under 35 USC 103(a) as being unpatentable over **Glasser '809** in view of **Tanglepaibul**.

(2) Dependent claim 31 stands rejected under 35 USC 103(a) as being unpatentable over **Glasser** in view of the **Benefits** reference.

(3) Dependent claims 32, 73 and 74 stand rejected under 35 USC 103(a) as being unpatentable over **Glasser** in view of **Terrytx**.

(4) Claims 24, 25, 45-56, 71 and 72 stand rejected under 35 USC 103(a) as being unpatentable over **Bueno**.

These rejections are respectfully traversed as the Examiner fails to present a *prima facie* case of obviousness in relation to the cited prior art.

***Rejection over Glaser and Tanglepaibul***

Claims 24, 25, 27-30, 35, 37-44, 69 and 70 are rejected over these references. In support of the rejection, the Examiner incorporates the basis of the rejection recited in the prior Office Action, wherein the Examiner takes the position that **Glaser** teaches (1) "that one would modify the amount of soluble and insoluble solids depending on the desired freezing properties of the soup concentrate", (2) "the vegetable composition in admixture with animal and vegetable fats which are solid or liquid at room temperature", and (3) that "the meat and/or solid preservatives, such as salt can be added (i.e., sauced by) the tomato composition".

The Examiner previously admitted, however, that **Glaser** "does not explicitly teach the composition as including 18-30% water insoluble solids and 80-94.5% or 70-80% water soluble solids, based on the total solids content as recited in claims 24 and 25, to the soup concentrate or soup composition as a ready to use sauce for food as recited in claims 39 and 40 or a food comprising the tomato composition as recited in claims 43 and 44."

The Examiner further acknowledged in the prior Action that **Glaser** teaches "the tomato composition contains about 33-68% soluble solids based on the dry residue in the final composition, and about 32-67% insoluble solids based on the dry residue in the final composition."

As such weight percentages differ from those of the claimed invention (i.e. 18-30% or 20-30% water insoluble solids, and 80-94.5% or 70-80% water soluble solids), the Examiner in the prior Action relied on **Tangletpaibul** to teach "that it was known to decrease the amount of water-insoluble solids in a tomato composition in order to decrease the viscosity and vice versa (Abstract)."

The Examiner accordingly concluded that it would have been obvious to increase the water insoluble solids content to increase the viscosity of the product, stating to "increase a known ingredient for a known intended result does not provide a patentable distinction to the claims absent any clear and/or convincing evidence and/or arguments to the contrary."

In response to applicant's prior arguments, the Examiner now states at pages 4-5 of the Final Rejection that:

"Applicant's argument is not convincing as the instantly claimed invention recites 18-30% or 20-30% water insoluble solids, and 80-94.5% or 70-80% water soluble solids; as Glasser teaches 33.33% insoluble solids (as stated in the previous Office Action and as calculated in applicant's arguments page 23) and 66.67% water insoluble solids (as stated in previous Office Action and as calculated in applicant's arguments page 23); and as Tanglertpaibul teaches motivation for modifying the amount of water soluble and insoluble solids (as stated in previous Office Action). Where the claimed and prior art products are substantially identical in structure or composition, a prima facie case of obviousness has been established, absent any clear and convincing evidence to the contrary. At the current time, Glasser teaches of a substantially identical product to that as instantly claimed and no evidence has been provided showing otherwise. Applicant has not provided any evidence to show that a difference of 3% in the insoluble and soluble solids leads to unexpected properties in the claimed product. Furthermore, as stated above, it would have been obvious to one skilled in the art to adjust the water insoluble solids and water soluble solids when desiring specific properties as taught by Tanlertpaibul and to do so would have been well within the skill of one in the art."

The Examiner's position is without basis.

By way of summary of the subject matter of the rejected claims:

- (1) rejected claims 24 and 25 are directed to a *tomato composition*,
  - (2) rejected claims 27-30 are directed to a *tomato composition having admixed therein an animal and/or vegetable fat* (such as butter, margarine, cheese, olive oil),
  - (3) rejected claims 37-38 are directed to a *saucing method* using the tomato composition,
- and

(4) rejected claims 39-40 are directed to a *tomato sauce*, and 41-44 are directed to *compositions or foods comprising the tomato composition*.

***1. The Rejection of Tomato Composition Claims 24-25, 27-30 and 35***

As previously argued, the Examiner primarily focuses on the soluble/insoluble solids content of the composition of **Glasser** in rejecting the above composition claims, while also stating at page 6 of the previous Office Action with respect to the identity of the **Glasser** composition that:

“**Glasser** teaches of a soup concentrate derived from vegetable matter, including tomatoes (i.e., **Glasser** teaches of a tomato composition). **Glasser** teaches that the tomato composition is obtained from tomato juice. Refer specifically to Abstract and Example 2.”

Again, the referenced Abstract contains no reference to tomatoes, merely vegetables (“A variety of soup concentrates, each containing meat or vegetable particulates . . .”). Indeed, **Glasser** defines exemplary vegetables at column 3, lines 55-62 as follows:

“Such cooked vegetable and meat pieces as mushroom slices, chicken pieces, beef pieces, corn peas, etc. are incorporated in judicious quantities into the mixture. Generally, these ingredients make up about 3.0 to about 30 percent by weight of the total weight of the concentrate. The variation in weight of the particles depends primarily on the type or variety of concentrate being formulated.”

*Again, no mention is made of the presence of tomatoes with reference to the cooked vegetable embodiment.*

Reference to tomatoes does reside at Example II as noted by the Examiner. However, such reference is in relation to a “cooked vegetable paste” component, which component is stated to comprise a “blend of 28.3% tomato paste (30% solids), 34.7% pea paste (18.5% solids) and 37.0% carrot paste (8.8% solids) cooked and pureed.”

Of the total vegetable soup concentrate of Example II of **Glasser**, the cooked vegetable paste comprises a mere 12.8% by weight. As the tomato paste component only comprises 28.3% of the vegetable paste, the overall tomato-based content of the vegetable soup concentrate is *only 3.6% by weight*. It is accordingly quite a stretch of the facts to characterize **Glasser's** vegetable soup concentrate as a "tomato composition obtained from tomato juice or tomato passatas" consistent with the claimed invention.

Indeed, given such a distinction, the relevance of the **Glasser** disclosure to the claimed invention is suspect at best. One of ordinary skill in the art, in seeking to provide a tomato-based composition in accordance with applicant's invention, clearly would not receive any guidance from the **Glasser** reference which is directed to a substantially non-tomato-based soup concentrate.

The Examiner dismisses this distinction at page 5 of the Final Rejection, stating "Glasser teaches of vegetable compositions and then teaches, in Example 2, that tomato is a vegetable of the invention." The Examiner further notes that "Glasser teaches, in Example 2, that vegetable paste, which includes tomato paste and juices, is included in the soup concentrate".

The Examiner's position is not supported by the teachings of the reference. **Glasser** does not teach or suggest, as applicant claims, "a tomato composition obtained from tomato juice or tomato passatas". Instead, **Glasser** merely discloses *a vegetable soup concentrate* that may, but not necessarily, contain a minor amount of tomato-derived component. The latter does not lead one of ordinary skill in the art to, or suggest, the former. The Examiner's conclusion can only result from ignoring the totality of the claim language, which is improper.

While the above distinctions were again raised during the interview, and are still believed to be valid in relation to **Glasser**, independent claim 24 is herein amended to make such



distinctions more apparent *by stating that the water-soluble solids and the water-insoluble solids present in the claimed composition are "tomato" solids consistent with the disclosure.* Such an amendment makes clear the distinction that exists between the claimed invention and that of **Glasser**, as the soup concentrate of the reference clearly does not contain *tomato* solids in an amount which falls within the stated ranges.

Despite the noted non-relevance of **Glasser** to the claimed invention, the Examiner continues to rely on **Tanglertpaibul** (as stated in the previous Action) to "teach that it was known to decrease the amount of water-insoluble solids in a tomato composition in order to decrease the viscosity and vice versa (Abstract)", previously concluding that "It would have been obvious to one of ordinary skill in the art at the time the invention was made to increase the amount of water insoluble solids in the tomato composition as taught by **Glasser** in order to increase the viscosity of the final product."

Even assuming that the Examiner's reliance on **Tanglertpaibul** is correct (which applicant disputes), the net result still does not yield the claimed invention, particularly in view of the deficiencies of **Glasser**, and in view of the present amendment of claim 24.

Indeed, *even if* the amount of water-insoluble solids may be achieved by increasing the viscosity of the soup concentrate of **Glasser** (a result now inconsistent with amended claim 24), such ignores the other limitations of (1) dry residue being present in an amount of from 5.5-20% by weight, and (2) water being present in an amount of 94.5-80% by weight.

Further, the amount of water-insoluble solids present *is based on the dry residue component*, not the overall composition.

Such results are not, as asserted by the Examiner, achieved merely by reducing the viscosity of the composition, particularly in view of the amendment of claim 24. The position of

the Examiner is based on an improper hindsight analysis of the cited prior art.

Thus, not only is the **Glasser** patent irrelevant to the issue of patentability of the claimed invention (particularly in view of the amended claims), but the patent is admittedly deficient in its teachings. Even if the patent is deemed relevant to the patentability of a tomato-based composition of claim 24 and the corresponding dependent claims, which applicant disputes, the patent fails to teach or suggest the requisite compositional limitations (as admitted by the Examiner).

As the additionally-cited reference fails to cure such deficiencies, the combined teachings of the references fail to result in the claimed invention.

The rejection of claims 24, 25, 27-30 and 35 is thus improper and should be withdrawn.

## ***2. The Rejection of Claims 37-38 Directed to a Method of Saucing***

Claims 37-38 are directed to a method of saucing food comprising mixing with food the novel tomato composition of the present invention.

Irrespective of the Examiner's view as to the above composition claims, the cited prior art cannot be said to in any way teach, suggest or render obvious the claimed saucing method of claims 37-38. Indeed, **Glasser** is directed to a "soup concentrate". The **Tanglertpaibul** reference is directed to "flow properties of tomato concentrates; effect of serum viscosity and pulp content". The summary of the reference states:

"The successful modeling of the apparent viscosity of tomato concentrates in terms of the serum apparent viscosity and pulp content will be useful in several applications: (1) for producing tomato concentrates of a desired viscosity with the desired amount of pulp; (2) for evaluating the relative contribution of soluble and insoluble solids to flow properties of tomato concentrates; and (3) for comparing and understanding the flow properties of different food suspensions such as apple sauce (Rao et al 1986) and concentrated orange juice (Vieli et al 1984)."

It is thus apparent that neither the **Glasser** nor the **Tanglertpaibul** references are directed to a tomato composition as claimed, nor are they directed to a method of saucing using a tomato composition as claimed in claims 37-38. Claim 37 has been written in independent form in an attempt to more clearly direct the Examiner's attention thereto.

It is further noted that the Final Rejection is silent regarding the continued rejection of claims 37-38. The previous Action of May 17, 2007 is also silent regarding the basis of the rejection of claims 37-38. In view of the continued deficiencies of the Examiner's position, and in view of the above discussion, the rejection of claims 37-38 is improper and should be withdrawn.

### ***3. The Rejection of Claims 39-40 Directed to a Ready-to-Use Tomato Sauce***

Claims 39-40 are directed to a novel ready-to-use tomato sauce comprised of the novel tomato composition of the present invention.

As noted above, neither **Glasser** nor **Tanglertpaibul** are in any way directed to a ready-to-use tomato sauce. This conclusion is apparent from the fact that **Glasser** is directed to a non-tomato-based soup concentrate, while **Tanglertpaibul** is directed to the theoretical aspects of tomato and fruit juice concentrates. The Examiner provides no basis in the Final Rejection for the assertion of obviousness directed to the rejection of claims 39-40. The sole basis for the rejection of claims 39-40 in the Office Action of May 17, 2007 is the Examiner's statement that "it was well known at the time the invention was made that soup concentrates and soup compositions were utilized as base mixtures for creating meals such as casserole dishes." The Examiner, based on this assertion, concluded that "it would have been obvious to one of ordinary skill in the art at the time the invention was made to use the tomato composition in a specific manner depending on the meal to be prepared", with one skilled in the art having "been motivated to use the tomato composition as a ready to use sauce in the preparation of a casserole dish".

In essence, it is apparently the Examiner's view that it is obvious to make any tomato composition and use it in any manner, irrespective of whether it is an actual sauce or not. To make such an assertion, the Examiner must not only ignore the express language of the claims (as to the compositional components), but must also ignore the express teachings of the cited prior art – none of which are directed to a tomato sauce composition as discussed above.

The rejection of claims 39-40 is accordingly without basis and should be withdrawn.

#### ***4. The Rejection of Claims 41-44 Directed to a Composition or Food***

The amendment of claim 24 makes more clear the distinction between the claimed tomato composition and the teachings of **Glasser** and **Tanglertpaibul** for the reasons discussed above. As discussed above, the combined teachings of the references do not result in the claimed tomato composition – nor do such combined teachings result in the claimed compositions and foods of claims 41-44.

In view of such deficiencies, the rejection of claims 41-44 is without basis and should be withdrawn.

#### ***Rejections over Glasser in view of Benefits or Terrytx***

Claims 31, 32, 73 and 74 are rejected over the combined teachings of these references. Claim 31 is directed to the combined animal and/or vegetable fat/tomato composition of claim 27 wherein the fat is olive oil. Claim 32 is directed to the same embodiment where the fat is soft, hard or grated cheese. Claim 73 is directed to an embodiment where hard or grated cheese is present in an amount of from 10 to 25% by weight. Claim 74 is directed to an embodiment where soft cheese is present in an amount of from 50 to 300% by weight.

Applicant has demonstrated that the invention of independent claims 24 and 25 (from which the rejected claims depend) is neither disclosed nor suggested by **Glasser**, particularly in

view of the above-discussed amendment of claim 24. As such, the additional citation of the secondary references, which do not cure the deficiencies of **Glasser**, does not result in the claimed invention.

Indeed, applicant has unexpectedly and surprisingly found that the claimed composition can incorporate, for example, by mechanical mixing, without exhibiting serum separation, animal and/or vegetable fats which are solid at room temperature (such as, for example, butter or margarine, and/or fats liquid at room temperature as, for example, vegetable oils such as olive oil and/or cheese). For example, applicant's Examples are directed to the use of olive oil (Examples 3 and 4), butter (Examples 5 and 6), soft grain cheese (Example 7) and hard grain grated cheese (Example 8).

This property is especially surprising as it is previously known that animal and/or vegetable fats which are either solid or liquid at room temperature and/or cheese are not mixable with tomato-based compositions as such, or with common canned tomato products.

The property of incorporating fats and/or cheeses allows one to obtain homogenous compositions (see Examples 3-9 noted above) with organoleptic properties superior to those of similar compositions prepared with common tomato products – i.e., Examples 3 and 4 are directed to the preparation of a tomato composition containing vegetable oil, Examples 5 and 6 are directed to the preparation of a tomato composition containing butter, Examples 7 and 9 are directed to the preparation of a tomato composition containing soft grain cheese, and Example 9 is directed to the preparation of a tomato composition containing hard grain grated cheese.

The invention of claims 31, 32, 73 and 74 is neither disclosed nor suggested by the cited prior art.

The deficiencies of the primary reference are discussed above. The Examiner cites two secondary references in an attempt to cure the deficiencies of **Glasser** – i.e., **Benefits** (The Benefits of Olive Oil), and **Terrytx** (Creamy Tomato Cheese Soup), 1999 Recipelink.com.

The first publication only talks about the benefits of olive oil and does not appear to be relevant to the present claims. The second publication teaches how to prepare a soup containing tomato (tomatoes skinned and chopped or canned chopped tomatoes), margarine and low fat cheese. Nothing is said that the margarine and the low fat cheese are *incorporated in* the soup. On the contrary, the publication states "Blend the soup until smooth in a liquidiser or food processor. Return to the saucepan and add the cheese, stirring to melt." It is evident that the cheese melts and remains by itself.

Applicant notes that the Examiner states at page 4 of the rejection that the claims do not recite the method in which the cheese is blended with the tomato product. In response, claim 27 (from which rejected claims 31, 32, 73 and 74 depend) is amended to state that the animal and/or vegetable fat is mechanically admixed with the tomato composition.

Also, the embodiments of claims 73 and 74 are not taught by the cited references. Claim 73 requires the presence of from *10 to 25% by weight* of animal and/or vegetable fats, while claim 74 requires the presence of from *50 to 300% by weight* of animal and/or vegetable fats in the composition. Such particularly large amounts of animal and/or vegetable fats are clearly outside the scope of the teachings of the cited prior art.

The rejection of claims 31, 32, 73 and 74 is thus without basis and should be withdrawn.

***Rejection over Bueno***

While maintaining the rejection over **Bueno** directed to claims 24, 25, 45-56, 71 and 72, the Examiner incorporates the basis of the rejection of May 17, 2007. In that rejection, the Examiner acknowledges that “**Bueno** does not specifically teach the tomato composition as including 5.5-20% dry matter as recited in claim 24, the tomato composition as sterilized or processed under sterile conditions as recited in claim 47, and the separation apparatus hole diameters as not greater than 0.1 mm as recited in claims 49, 50 and 51.”

Given such deficiencies, applicant again submits that the rejection over **Bueno** should be found baseless as not supporting a *prima facie* case of obviousness, particularly in view of the present amendment to claim 24.

***Indeed, the reference fails to teach or suggest a tomato product made by the steps recited in claim 45, or the corresponding dependent claims.***

The Examiner states at page 4 of the Action that “**Bueno** teach combining a tomato product with a cheese product, to form a final tomato product”, with the Examiner concluding that **Bueno** thus reads upon the instantly claimed invention.

In response, applicant finds the Examiner’s view to be mistaken, as “*cheese*” is not even mentioned in **Bueno**. The combination of cheese with a tomato product is thus not suggested by **Bueno**. The Examiner is accordingly requested to reconsider her position on this point.

The Examiner further states at pages 9-10 of the Action:

“regarding the tomato composition as including 5.5-20% solids, **Bueno** teaches that the tomato composition has a solids content of about 28%. It was known in the art at the time the invention was made to adjust the water content of vegetable paste and juice products depending on the desired sugar content per serving, solid content per serving (i.e., the amount of pulp) and water content per serving. It would have been obvious to one of ordinary skill in the art at the

time the invention was made to increase the water content of the tomato composition in order to decrease the amount of sugar per serving of the tomato composition (i.e., in order to reduce the calorie content of the composition) and/or the amount of pulp per serving in the tomato composition (i.e., in order to form a composition with a more smooth texture) and/or to increase the water content of the tomato composition (i.e., in order to form a mixture which would better hydrate the consumer)."

In the prior response, applicant made reference to Exhibits 5 and 6 in support of a discussion regarding distinctions between "water soluble matter" and "water soluble matter (% calcination)".

The respective compositions were stated to differ based on the content of insoluble solids. At page 9 of the prior Action, the Examiner states at lines 15-19 that "**Bueno** teaches that the composition includes about 24% water insoluble solids based on the total solids – Example 1, Table 3 (90.1% water soluble matter)/(90.1% water soluble matter + 28.98%/dry matter) = about 24% water insoluble solids based on the weight of the total solids".

The expression "water soluble matter" does not conform to the Table 3 used by **Bueno**. Nowhere in Table 3 is the expression "water soluble matter" used. Instead, in Table 3 of **Bueno** the expression used is "water soluble matter (% calcination)". The two expressions "water soluble matter" and "water soluble matter (% calcination)" have totally different meanings.

The term "water soluble matter" indicates a matter soluble in water that consists only of inorganic compounds or organic compounds or both (organic and inorganic together). The last embodiment is the case for tomato products and generally of all vegetables. In tomato products there is a marked preponderance of organic compounds.

The expression "water soluble matter (% calcination)" indicates matter soluble in water that consists exclusively of *inorganic* compounds and is obtained with an initial operation of calcination. Previously-submitted Exhibits 5 and 6 herewith report the analytical schemes used



in order to obtain the content of water soluble matter (calcination) starting from fruit and vegetable juices (Exhibit 5) or canned vegetables (Exhibit 6).

Exhibit 5 of record contains at page 3 the definition of ash content of "The residue of a fruit or vegetable juice or related product obtained with organic constituents and water *are completely removed* by calcination expressed in g/l".

Therefore, it clearly results that (1) the initial process is a calcination that allows one to obtain the ash content, and (2) during calcination the organic constituents and the water are *completely removed*.

From Exhibit 6 of record applicant previously directed the Examiner's attention to paragraphs 32.027, 31.012, 31.013, and 31.015. At paragraphs 32.027, 31.012 and 31.013 a description is found of the methods used to determine Ash. At paragraph 31.015 is found the description of the method used to determine soluble and insoluble Ash.

The soluble Ash coincides with the water soluble matter (calcination). The percentage of soluble Ash present in Ash coincides with the water soluble matter (% calcination) referenced by **Bueno**.

In the case of **Bueno**, the Examiner is apparently misled by the lack of indications regarding the analytical methods used.

The calculation method used by the Examiner that leads to a specific content of from 24% of water insoluble solids in dry matter is accordingly incorrect. The effective content of water insoluble solids is instead 3.38%.

At page 5 of the instant application (paragraph [0087]) the calculation method is specified which is used to determine water insoluble solids:

"The determination of water insoluble solids has been carried out by calculating the weight difference between the dry residue and that of water

soluble solids (Brix value) as reported in "Tomato production, Processing and Technology", 3<sup>rd</sup> edition, by W.A. Gould, CTI Publications, Inc., 1992, page 317 (see Exhibit 7).

Table No. 3 of **Bueno** indicates the necessary values for the calculation of water insoluble solids as Brix 28.0 and Dry matter (%DM) 28.98. Following the same procedures reported by the above Gould publication, the result obtained for **Bueno** is instead 3.38% of water insoluble solids in dry matter. The level of water insoluble solids taught by **Bueno** is thus actually far below the minimum amount of 18% required by claim 24.

The Examiner, in response to the above, states at page 6 of the Action that "applicant has not provided or has not identified a submitted 'exhibit 5' or 'exhibit 6', thus at the current time applicant's argument is not convincing."

Applicant disagrees with the Examiner's position for the reason that Exhibits 5 and 6 were in fact submitted with the prior response (together with Exhibits 1-4 and 7). Duplicate copies of Exhibits 5 and 6 are again submitted herewith. A review of the Patent Office electronic file wrapper confirms the presence of Exhibits 5 and 6. The Examiner's attention was directed to this fact during the interview. Applicant accordingly requests that the Examiner review Exhibits 5 and 6 (of record) in relation to applicant's arguments above with respect to the **Bueno** reference.

The rejection over **Bueno** is accordingly without basis, and should be withdrawn.

### Conclusion

It is respectfully submitted that the Examiner has not met the tests set forth by the Courts to support a *prima facie* case of obviousness. It is the applicant's view that hindsight reconstruction is being used to allegedly assert obviousness against the claims in the present

application. Having established unobviousness for claims 24 and 25, it is clear that the remaining claims should also be allowable.

The foregoing amendments and remarks are fully responsive to the Office Action of January 11, 2008. Thus, favorable consideration and allowance of the claims are respectfully requested.

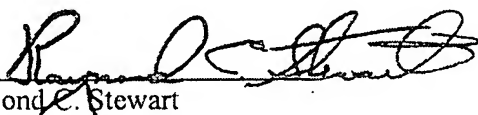
Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact Raymond C. Stewart, Reg. No. 21,066 at the telephone number of the undersigned below, to conduct an interview in an effort to expedite prosecution in connection with the present application.

Payment in the amount of \$1050.00 is submitted herewith as payment for the requested three month extension of time.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37.C.F.R. §§1.16 or 1.14; particularly, extension of time fees.

Date: July 11, 2008

Respectfully submitted,

By   
Raymond C. Stewart  
Registration No.: 21,066  
BIRCH, STEWART, KOLASCH & BIRCH, LLP  
8110 Gatehouse Road.  
Suite 100 East  
P.O. Box 747  
Falls Church, Virginia 22040-0747  
(703) 205-8000  
Attorney for Applicant

Attachments: Exhibits 5 and 6 (previously submitted)